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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted]339

ANNE P. NEWMAN, SHARON W. NEAL and JOHN MUNGIN,

Petitioners,

v.

PIGGIE PARK ENTERPRISES, INC., a Corporation, and L. MAURICE BESSINGER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PIGGIE PARK ENTERPRISES, INC., a Corporation, and L. MAURICE BESSINGER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on April 24, 1967.

Citation to Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported, and is set forth in the appendix hereto, *infra* p. 1a. The decision of the United States district court for the district of South Carolina is reported at 256 F. Supp. 941, and appears in appendix *infra* p. 11a and in the record at pp. 206a *et seq.*

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 24, 1967. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Question Presented

Whether the Court of Appeals correctly construed Title II of the Civil Rights Act of 1964 as denying recovery of counsel fees by Negroes excluded from places of public accommodation unless a showing is made that a restaurateur's patently frivolous defenses and obstructive tactics were the product of dishonesty and bad faith.

Statutory Provisions Involved

This case involves Title II of the Civil Rights Act of 1964, 42 U.S.C. §§2000a *et seq.*, and more particularly, 42 U.S.C. §2000a-3(b):

> In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . .

Statement

Negro plaintiffs instituted this class action December 18, 1964 against the corporate operator of a chain of six restaurants and its president and principal stockholder, seeking injunctive relief prohibiting exclusion of Negroes and recovery of counsel fees pursuant to the Civil Rights Act of 1964, 42 U.S.C. §§2000a *et seq.* The complaint alleged, in summary, that at various locations in South

Carolina the corporation operates restaurants which affect commerce and where Negroes are refused service (R. 1a-7a).

Defendants answered by denying Negroes were refused service; that operation of the restaurants affected commerce; and that the restaurants were places of "public accommodation" as that term is defined in the Civil Rights Act of 1964.[1] Defendants asserted that Title II is unconstitutional in violation of the Commerce Clause (Art. I, §8); the Privileges and Immunities Clause (Art. IV, §2); the Due Process and Equal Protection Clauses of the Fourteenth Amendment; and the Thirteenth Amendment to the Constitution of the United States. In addition, the corporation president alleged that service of food to Negroes, as required by Title II, violated his freedom of religion as protected by the First Amendment (R. 8a-10a; 11a-13a; 17a-20a).

At a trial, April 4-5, 1966 (R. 21a-205a), the facts as found by the district court were not materially disputed. The corporation operates six eating places, five of which are drive-ins located on major highways (R. 211a-212a). The sixth, Little Joe's Sandwich Shop, is in downtown Columbia, South Carolina with tables and chairs for approximately sixty customers (R. 212a). The district court found "at least" forty percent of the food purchased by the restaurants each year moved in commerce (R. 221a) and that the restaurants served many interstate travelers (R. 215a-216a). It concluded that the operation of the six restaurants affected commerce within the meaning of Title II, 42 U.S.C. §2000a-(c)(2).

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[1] Defendants filed an answer February 5, 1965, an amended answer August 23, 1965 and were permitted by the district court to file a second amended answer March 19, 1966. All generally denied the allegations of the complaint.

Despite denials of Negro exclusion in the pleadings, the president of the corporation, a corporation bookkeeper, and a waitress testified that Negroes were served only on a kitchen door take-out basis (R. 160a, 169a, 172a, 189a). The district court found also that two plaintiffs had been denied service at one of the restaurants because of race (R. 214a-214a).

Although the district court found discrimination, and that operation of the six restaurants affected commerce, it excluded the five drive-ins from coverage on the ground that Congress had not intended Title II to apply to drive-ins. It entered an order enjoining racial discrimination at the Sandwich Shop only, awarded Negro plaintiffs their costs, but refused to award counsel fees, *infra* p. 34a (R. 229a).

Plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit; the United States filed a brief *Amicus Curiae* supporting plaintiffs' position that the drive-in restaurants were covered by the Act. The Court of Appeals, sitting *en banc,* agreed holding that the district court should have enjoined racial discrimination at all restaurants operated by the defendants.

The Court of Appeals further instructed the district court "to consider the allowance of counsel fees, whether in whole or in part," and set forth the "subjective" test which district courts should apply to determine whether to permit recovery of counsel fees, *infra* p. 7a:

> In exercising its discretion, the district court may properly consider whether any of the numerous defenses interposed by defendants were presented for purposes of delay and not in good faith. But the test should be a subjective one, for no litigant ought to be punished under the guise of an award of counsel fees (or in any other manner) from taking a position

in court in which he honestly believes—however lacking in merit that position may be.

Judge Winter, with whom Judge Sobeloff joined, disagreed with the majority conclusion that "good faith, standing alone," should "immunize a defendant from an award against him." Judge Winter examined the relationship of the provision for recovery of counsel fees to enforcement of Title II, and concluded that a "subjective" test would frustrate compliance, *infra* p. 9a:

> In providing for counsel fees, the manifest purposes of the Act are to discourage violations, to encourage complaints by those subjected to discrimination and to provide a speedy and efficient remedy for those discriminated against. If counsel fees are withheld or grudgingly granted, violators feel no sanctions, victims are frustrated and instances of unquestionably illegal discrimination may well go without effective remedy. To immunize defendants from an award of counsel fees, honest beliefs should bear some reasonable relation to reality; never should frivolity go unrecognized.

Petitioners are represented by retained private counsel of Columbia, South Carolina, who have been assisted by salaried attorneys of a nonprofit civil rights organization. The award of counsel fees is sought only by the retained South Carolina counsel for their services, and not for others.

REASONS FOR GRANTING THE WRIT

Introduction

This is a case of first impression in this Court. The Court of Appeals has construed the counsel fees provision of the public accommodation Title of the Civil Rights Act of 1964 to authorize an award only when under a "subjective" test, a litigant takes a position "not in good faith." Unless a district court finds such a state of mind, a prevailing party is not entitled to recover counsel fees "however lacking in merit" the position taken or tactics employed by a discriminator.

We believe that such a construction of §2000a-3(b) seriously impairs the acknowledged congressional purpose "to assure rapid and effective compliance" with Title II, *infra* p. 7a; that limitation of an award to cases where bad faith is shown injects an element of culpability into the counsel fee provision unrelated to the purposes of Title II; and that the Court of Appeals, by limiting awards to occasions when a court of the United States would have been authorized to award a fee without statutory authority, has seriously misread the intent of Congress.

The counsel fee provision of Title II is an important means of promoting widespread compliance with the Act by placing restaurateurs on notice that frivolous refusal to comply promptly may lead to judicial proceedings in which the burden of expenses may be on the restaurant, not the wronged plaintiff, if the defendant resists on frivolous grounds or is dilatory in his defense. If restaurateurs are permitted to avoid an award of counsel fees on the basis that they honestly believe in a position, how-

ever lacking in merit that position may be, the incentive to comply promptly will be significantly reduced.

We call the Court's attention to the fact that discrimination in public accommodations remains a serious problem once a Negro leaves well-travelled interstate highways.[2] As a recent survey by the New York Times ("Integration in South: Erratic Pattern") put it:

> It is possible to motor through the green valleys of Virginia, veer through the cotton fields in Alabama and Mississippi, and end up in Texas cattle country with the conviction that racial segregation and discrimination are gone at last.
>
> You could get that impression if you dined at chain restaurants like Howard Johnson's, slept in chain motels such as the Holiday Inns, ...
>
> A different itinerary might leave you convinced that the South has not changed at all. Asking for a night's lodging in an obscure motel can be risky for

[2] While appellants have been unable to ascertain the precise number of Title II actions involving restaurants presently pending before the federal courts, the number of cases known to petitioners suggests that the total is large. See, *Little* v. *Sedgefield Inn,* No. C-180-G-65 (M.D. N.C.); *LeShore* v. *Carter,* No. 3614-65 (S.D. Ala.); *LeFlore* v. *Butlers Chick-a-Teria,* No. 4360-66 (S.D. Ala.); *Lawson* v. *Tito's Restaurant,* No. 4361-66 (S.D. Ala.); *Johnson* v. *Larry's Restaurant,* No. 4363-66 (S.D. Ala.); *Hughes* v. *Falgut,* No. 66-741 (N.D. Ala.; injunction entered April 13, 1967); *Gregory* v. *Myer,* appeal docketed, No. 32948 (U.S. Ct. of App. 5th Cir.); *Goodwill* v. *Presto Restaurant,* No. 4359-66 (S.D. Ala.); *Goodwill* v. *Fletcher's Bar-B-Que,* No. 4362-66 (S.D. Ala.); *Goode* v. *Johnny's Drive-in Restaurant,* No. 4358-66 (S.D. Ala.); *Goode* v. *Acme Cafe,* No. 4357-66 (S.D. Ala.); *Epps* v. *Krystal Co.,* No. 66-648 (N.D. Ala.); *Braxton* v. *Jeanette,* No. 505 (E.D. N.C.); *Bates* v. *Bonner Private Club,* No. 1222 (S.D. Ga.); *Mitchell* v. *Krystal Co.,* No. 65-579 (S.D. Ala.); *Nesmith* v. *Raleigh YMCA,* No. 1768 (M.D. N.C.); *Wooten* v. *Moore,* No. 631 (E.D. N.C.); *Stout* v. *YMCA of Bessemer,* No. 66-715 (S.D. Ala.); *Rax* v. *Piper,* No. 11,307 (W.D. La.); *Miller* v. *Amusement Enterprises, Inc.,* appeal docketed, No. 24,259 (U.S. Ct. App. 5th Cir.); *Kyles* v. *Paul,* appeal docketed, No. 18824 (U.S. Ct. App. 8th Cir.)

> a Negro who wants to avoid embarrassment. And in countless small towns, independent restaurants cater mainly to an all-white clientele, and Negroes still watch movies from segregated balconies.

(N. Y. Times, May 29, 1967, P. 1, Col. 1)

In enacting Title II, Congress labored long to fashion a scheme which would assure prompt compliance by nearly all eating facilities because it is scant consolation to the Negro interstate traveler that many restaurants are desegregated if the one he enters continues to discriminate. Commerce is burdened by the very uncertainty that all eating facilities are not desegregated. As it limits application of the counsel fee provision to the unusual case where the elusive concept of manifest insincerity is demonstrated, the construction given §2000a-3(b) by a majority of the court of appeals only serves to stiffen resistance to the elimination of discrimination in public accommodations.

The Court of Appeals incorrectly construed Title II of the Civil Rights Act of 1964 to permit recovery of counsel fees only upon a showing of subjective bad faith

In actions brought to desegregate public accommodations, the Civil Rights Act of 1964 provides that a prevailing party may recover reasonable attorney's fee (42 U.S.C. §2000a-3(b)):

> In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .

The court of appeals, sitting *en banc*, directed the district court to exercise its discretion to award counsel fees only if it found subjective bad faith, *infra* p. 7a:

> "In exercising its discretion, the district court may properly consider whether any of the numerous defenses interposed by defendants were presented for purposes of delay and not in good faith. But the test should be a subjective one, for no litigant ought to be punished under the guise of an award of counsel fees (or in any other manner) from taking a position in court in which he honestly believes—however lacking in merit that position may be."

The court below, therefore, has construed §2000a-3(b) to make the vagrant notion of good faith a complete defense to recovery of counsel fees regardless of how patently frivolous or how obstructive the tactics employed. Such a construction is a variance with the congressional purpose in enacting §2000a-3. As Judges Winter and Sobeloff put it, *infra* p. 9a:

> In providing for counsel fees the manifest purposes of the Act are to discourage violations, to encourage complaints by those subjected to discrimination and to provide a speedy and efficient remedy for those discriminated against. If counsel fees are withheld or grudgingly granted, violators feel no sanctions, victims are frustrated and instances of unquestionably illegal discrimination may well go without effective remedy. To immunize defendants from an award of counsel fees, honest beliefs should bear some reasonable relation to reality; never should frivolity go unrecognized.

The soundness of Judge Winter's construction of the section is demonstrated by the legislative history of Title II

as a whole and §2000a-3(b) in particular. Title II demonstrates a plain desire to deter any substantial or prolonged litigation which is inconsistent with the narrow construction below of §2000a-3(b). For example, 42 U.S.C. §2000a-3(a) permits intervention by the Attorney General in privately initiated public accommodation suits, appointment of counsel for a person aggrieved, and "the commencement of the civil action without the payment of fees, costs or security." 42 U.S.C. §2000a-5 authorizes the Attorney General to commence litigation where there is "a pattern or practice of resistance to the full enjoyment" of Title II rights. 42 U.S.C. §2000a-2 broadly prohibits any attempt to punish, deprive, or interfere with rights to equal public accommodations. See *Georgia* v. *Rachel*, 384 U.S. 780 (1966); *Hamm* v. *City of Rock Hill*, 379 U.S. 306 (1964). "The Act as finally adopted was most comprehensive, undertaking to prevent through peaceful and voluntary settlement discrimination in . . . public facilities" *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 246 (1964). The counsel fee provision of 42 U.S.C. §2000a-3(b) is part of the congressional plan for deterring evasion and resistance to the "full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation," 42 U.S.C. §2000a-(a). Although the court below found that in enacting Title II "Congress intended to assure rapid and effective compliance with its terms," *infra* p. 7a, it construed §2000a-3(b) in a manner which makes "rapid and effective compliance" more, not less, difficult.

The legislative record is scanty, but such debate as relates to §2000a-3 evidences intent to induce compliance by penalizing the assertion of frivolous claims. On the other hand, there is no support in the legislative history for the notion that frivolity must be combined with a

subjective mental state evincing bad motives. In fact, when Senator Ervin sought to eliminate the provision from the Act on the ground that it would make those benefiting from it special favorites of the law and would encourage "ambulance chasing" his amendment was rejected, 110 Cong. Rec. 14201, 14213-14 (June 17, 1964). Senator Pastore made a brief statement in defense of the provision stating that its purpose was deterrence of frivolous suits and " . . . the court within its discretion is given power to order payment of attorneys' fees to the prevailing party. . . . It is not favoritism towards one party as against the other," 110 Cong. Rec. 14214 (June 17, 1964).[3] Senator Miller emphasized the deterrence of frivolous litigation. He saw no need to delete the section because attorneys would be compensated only if they raised positions with merit:

> . . . I believe that this is the answer to the Senator from North Carolina, that if we are concerned about ambulance chasing, we had better realize that the ambulance chasers are not about to be in the business if there is no profit in it for them. They will be in the business only if they can make a profit. They

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[3] Senator Pastore stated:

> The purpose of this provision in the modified substitute is to discourage frivolous suits. Here, the court within its discretion is given power to order payment of attorneys' fees to the prevailing party. First of all, it is within the discretion of the court. It is not favoritism towards one party as against the other. When a person realizes that he takes the chance of having attorneys' fees assessed against him if he does not prevail, he will deliberate before he brings suit. He will make certain that he is not on frivolous ground. (110 Cong. Rec. 14214, June 17, 1964).

Senator Pastore's emphasis on frivolous *suits* is clearly explained by the character of the challenges raised to the section by Senator Ervin. The only construction of Senator Pastore's remarks consistent with their context and the language employed in the statute is that the provision was meant to penalize the assertion of frivolous claims by either party.

> are not going to make such profit out of any cases except those which are meritorious, so I believe that the point is exaggerated, and I believe the amendment is inadvisable (110 Cong. Rec. 14214, June 17, 1964).

Thus, the Senators concerned spoke of the counsel fee provision as if its application turned on merit or lack of it, not good or bad faith.[4] But, as the record here demonstrates, to limit recovery of counsel fees to occasions of subjectively determined bad faith makes the application of §2000a-3(b) turn on a principle which has only fortuitous relation to the deterrence of extended noncompliance and frivolous litigation. The facts of this case show tactics and frivolous defenses which unjustifiably delayed compliance and complicated petitioners burden of proof, but, unless one chooses to infer bad faith, they do not demonstrate any state of mind.

The defendant corporation in this case pursued various claims that 42 U.S.C. §2000a-(c)(2) was unconstitutional years after that question had been definitively resolved by this Court in *Katzenbach* v. *McClung*, 371 U.S. 291 (December 14, 1964). Indeed, it filed a second amended answer raising such defenses March 30, 1966, after "carefully reviewing the pleadings heretofore filed" (R. 16a). Defendants also denied their activities affected commerce forcing petitioners to offer lengthy proof. But after trial, the district court, which erroneously excluded the drive-in facilities on another ground, had no trouble determining that all six facilities were clearly covered by the Act both

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[4] A construction of §2000a-3(b) which makes an award of fees turn on objective factors is not inconsistent with the discretion it lodges in the district courts. That discretion is appropriately exercised to determine the application of objective standards and the amount of counsel fees which should be awarded, not to determine whether or not petitioners shall receive any counsel fees solely because a restaurateur may honestly believe that frivolous or dilatory tactics are justifiable.

because a substantial portion of the corporation's food moved in commerce and because it served or offered to serve interstate travelers. Either circumstance satisfies the "affect commerce" standard of the Act. Likewise, "The fact that the defendants had discriminated both at Piggie Park's drive-ins and at Little Joe's Sandwich Shop was of course known to them, yet they denied the fact and made it necessary for the plaintiffs to offer proof, and the defendants could not and did not undertake at the trial to support their denials," *infra* p. 10a. Finally, defendants contended the Act was invalid because it "contravenes the will of God" and constitutes an interference with the "free exercise of the Defendant's religion," *infra* p. 10a.

These defendants have done, therefore, just what Congress sought to deter. "The district judge should be told that in awarding counsel fees, he should include an amount which fully compensates plaintiffs for the time, effort and expenses of counsel in overcoming these elements of expense needlessly imposed on them" without a showing of bad faith, *infra* p. 10a.

Federal equity courts have inherent power to grant counsel fees in a narrow class of cases where manifest insincerity and bad faith have been shown. *Rolax* v. *Atlantic Coastline Railroad Co.*, 186 F.2d 473 (4th Cir. 1951); *Bell* v. *School Board of Powhatan County*, 321 F.2d 494, 500 (4th Cir. 1963). In §2000a-3(b), however, Congress plainly intended something more than statutory codification of an already existing equitable authority for Congress authorized payment of a reasonable fee to the prevailing party in the face of objections that such a provision was unusual and did so in the context of a comprehensive and delicate scheme for achieving prompt

change in the discriminatory practices of numerous restaurateurs. This Court should not conclude, as did the Court of Appeals, that Congress meant to add nothing to the power of the federal courts by passage of §2000a-3(b).

CONCLUSION

WHEREFORE, petitioners pray that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX